PUBLIC PROSECUTOR

v.

MAUDGIN BIN ALIPUDIN

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL TRIAL NO. T. 3 OF 1993]
27 SEPTEMBER 1993

DANGEROUS DRUGS: Trafficking in cannabis - Differing versions of events leading to arrest, the arrest and events subsequent to the arrest from prosecution and defence - Material witnesses to support prosecution's case not located - Credibility of testimony of arresting officers questionable - Whether accused's version casts reasonable doubt on case of prosecution.

The accused Maudgin bin Alipudin was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 with trafficking in 612.5 g of cannabis. The prosecution and defence tendered differing versions of the events leading up to and after the arrest. The accused was, according to the prosecution, arrested at a spot near a bridge after an informant supplied them with a description of the accused adding that the accused had a brown bag containing cannabis. This informant was not called to testify in Court. The accused however claimed that a person called Pidring whom he had argued with had passed him near the alleged spot and come back with policemen who arrested him. The said Pidring had taken his brown bag which had been packed by his wife and contained clothing and personal belongings to a swamp nearby and returned some 10 minutes later and placed it under the accused's feet. The accused further added that a man called Pabian had been with him throughout the said event and had admitted the cannabis to be his at the police station. However, the prosecution failed to locate Pabian although they did not deny his existence. The Court had to consider whether the accused had cast a reasonable doubt on the case for the prosecution.

Held:

[1] The prosecution did not challenge the existence of the accused's wife and of her packing the brown bag yet did not offer any evidence on whether the accused's wife and the house where she lives exists as claimed by the accused in his version of the events. Further, Pabian was a vital and important witness who could give independent evidence to support either side. The absence of Pabian's testimony is sufficient to create a reasonable doubt as to whether the events occurred in the manner described by the prosecution or in the manner described by the defence.

[2] The testimony of the two policemen at the material time of the arrest is biased and unreliable. They have faulty memories which make it unsafe for the Court to rely on their evidence solely to convict the accused. They were giving evidence of events which occurred more than $6^1/_2$ years ago and as such could not recall many things.

[3] The informant in the prosecution's case could well have been the Pidring mentioned by the accused. The informant should have had his name and statement taken by the police so as to assist the police in the investigation of the case. But the police failed to do this and the informant has vanished. The allegation of the existence of Pidring and his part in the matter has further cast a reasonable doubt on the prosecution case. There is also a failure of corroboration in the testimony of one of the police officers in the discovery of the cannabis in the bag at the place of arrest by his colleague.

[4] The evidence in the case has created a reasonable doubt on a balance of probabilities in the case against the accused.

[Accused acquitted and discharged].

Cases referred to:

Mohamad Radhi bin Yaakob v. PP [1991] 3 CLJ 2073 ***(refd)***

Muharam bin Anson v. PP [1981] 1 MLJ 222 FC ***(refd)***

Abdullah Zawawi v. PP [1985] 2 CLJ 2 / [1985] 2 MLJ 16, SC ***(refd)***

Legislation referred to:

Dangerous Drugs Act, 1952 s. 39B (1) (a), (2)

For the accused - Chung Thau Yong
For the prosecution - Ahmad Kamal Bin Mohd. Sahid, DPP

JUDGMENT

Ian H.C. Chin J:

The Charge

Maudgin bin Alipudin ("the accused") is charged with trafficking in 612.5 grammes of cannabis at the side of a road leading to Kg. Singgahmata, Lahad Datu, Sabah, at 8.15 p.m. on 13 March 1987, in contravention of s. 39B(1)(a) and

punishable under s. 39B(2) of the Dangerous Drugs Act 1952.

Prosecution Evidence

Three off-duty policemen, sergeant Nasyarudin bin Ahmad ("PW2"), constable Okab bin Sigar ("PW6") and constable Mustafa Al Bakri bin Hussien ("PW8"), were having drinks in a stall in the town of Lahad Datu on 13 March 1987 at about 8.00 p.m. when a man, not acquainted to them, sat at their table and told them that a male person spotting long hair, a red T-shirt and a pair of blue jeans would at any time emerge from Kg. Singgahmata via a bridge and that this person would be carrying a brown bag containing cannabis. The policemen immediately went on foot to a bus station which was near the said bridge to lay in wait for the said male person. On their way to the bus station, the place where they intended to wait in ambush, the three policemen took off their shirts to avoid recognition. Some 5 minutes after their arrival at the bus station, they saw the accused walking on the said bridge carrying a brown bag with his left hand, spotting shoulder-length hair, wearing a red T-shirt and wearing a pair of blue jeans, just as described by the informer. The accused after crossing the said bridge walked to the side of a road, which was opposite the bus station, squatted and placed the brown bag by his left side. A man called Pabian bin Ardi ("Pabian") came from a different direction and when he reached the accused he squatted by the right side of the accused. PW2 and PW6 thereafter walked towards the accused and Pabian to effect an arrest. PW8 remained in the bus station just in case any of the two men ran his way. When PW2 was near the accused and Pabian, he introduced himself as the police, showed his warrant card and applied the set of handcuffs to the accused and Pabian. A search was made by PW2 of the bodies of the two men but nothing was found. PW2 then in the presence of the accused, opened the zip of the brown bag and he found a newspaper-wrapped package of dried leaves beneath some clothing. PW2 also unzipped two side pockets of the brown bag and found, in one, 4 small newspaper-wrapped packets containing dried leaves and, in the other, another newspaper-wrapped package of dried leaves. He questioned the accused regarding what he found. The accused, Pabian and the brown bag together with its contents ("the exhibits") were taken back to the police station. At the police station, one Inspector Suhaimi Hj Wiro ("PW9") took charge of the investigation. PW9 interviewed the accused and Pabian. He took possession of and marked the exhibits. The dried leaves found in the brown bag were sent by him to a chemist called Khalid Safan ("PW1") who testified that the dried leaves were cannabis. Other witnesses were called to complete the chain of evidence regarding the custody of the exhibits from time to time until they were produced in Court; these witnesses were Inspector Mohd. Izaan bin Abdullah ("PW3"), Constable Salihin bin Yunus ("PW4") and Constable Kamis bin Timbang ("PW7"). Pabian could not be traced to give evidence. It was upon the evidence that I have just summarised that I called upon the accused to enter upon his defence. There are discrepancies in the evidence of the prosecution but they, at that stage of the proceedings, were not in the way of a *prima facie* case being established.

Defence Evidence

The accused gave evidence on oath. He said he came from the Philippines and was just before his arrest, working for Yap & Son in a plantation in Jalan Silabukan, Lahad Datu. On 12 March 1987, he went to the town of Lahad Datu and went straight to his sister-in-law's house in Kg. Singgahmata where his wife was staying and stayed for the night. The houses of Kg. Singgahmata are built on the sea front of the town of Lahad Datu. On the morning of 13 March 1987, he went to the office of his employer which was in Lahad Datu and inquired when Karim would be going to the plantation so that he could follow him back to the plantation. He was told by Karim to wait that night at the end of the bridge of Kg. Singgahmata as Karim, apparently, would be going to the plantation that night. He and his wife, after buying fish at the fish market, were heading for Kg. Singgahmata when Pabian, who was known to him, stopped him. A conversation ensued between him and Pabian, with Pabian inquiring whether he could get a job at the plantation and with him telling Pabian to wait at the end of the bridge at 8.30 p.m., presumably to await the arrival of Karim who would be taking him (the accused) to the plantation. By about 7.00 p.m. his wife packed a bag (Exhibit P6) containing 2 shirts (Exhibits P8 (a) and P8 (b)), 2 trousers (Exhibit P8 (c) and P8 (d)), an album and a bottle of perfume. He then fetched Pabian who was also staying in Kg. Singgahmata. He and Pabian then proceeded to the road side near the end of

the second bridge which they had traversed carrying the bag containing the said clothing, album and perfume. They sat on a piece of wood at the road side. That was about 7.15 p.m. The bag was placed by his right side and they sat chatting while waiting for Karim to turn up to take them to the plantation. Not long afterwards, a man called Pidring whom he had quarrelled with before walked by. Pidring went away and came back with PW2 and they were both shirtless. PW2 took out a pistol and pointed it at him and said to him that he was a police and held his right hand to his back while Pidring hit him on his back. PW2 thereafter applied the handcuffs to him and Pabian. While being taken to a car which was parked about 45 feet away, he saw Pidring carry the bag to a swamp. When they reached the car, another man was already seated in the car. After waiting in the car for about 10 minutes Pidring came back from the swamp and placed the bag below his feet. Pidring then went to the driver's seat and drove the car to the police station. When they reached the police station, Pidring opened the door of the car, took the bag from his feet and slung the strap of the bag over his shoulder. He was thereafter taken to the enquiry office of the police station where he sat down near a table upon which the bag was placed by a policeman. The bag was for the first time opened on top of the table by the policeman. The policeman put his hand inside the bag and retrieved a package from the bag which he had no knowledge of and thereafter asked who owned the package to which Pabian replied that it was his. He, when asked by the policeman, said the bag containing the clothing, album and perfume belongs to him. He thereafter, as ordered, took off his shirt and trousers and was locked up in the police cell for about a week. That it was only thereafter, according to him, that PW9 interrogated him. He alleged PW9 asked him to admit owning the package of cannabis but he refused. One Inspector Abu Bakar took a statement from him and he signed the statement. He spent a total of about 3 weeks in the police cell before he was taken to the Tawau prison. Those were the relevant evidence of the accused.

Whether any reasonable doubt

Since my decision on whether the accused had raised any reasonable doubt in the case of the prosecution is decisive of the case herein and since, irrespective of whether believe or disbelieve the accused, I still have to consider whether any reasonable doubt has been created by the evidence of the accused, I will proceed straight to determine whether the evidence of the accused had created, on a balance of probabilities, any reasonable doubt in the case of the prosecution. See *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073. In so far as the evidence of the accused that he worked in a plantation, that he on 13 March 1987 went to the office of the plantation owner in the town of Lahad Datu to arrange with a clerk called Karim to take him back to the plantation and that it was arranged that he should wait near a bridge of Kg. Singgahmata for Karim to turn up, were not challenged by the prosecution. I can take it that those evidence are not in dispute. There is also nothing inherently incredible about those evidence. I also cannot find any reason for disbelieving the accused in respect of those evidence. The next part of the evidence that calls for consideration is the packing of the bag by the wife of the accused on the night of 13 March 1993 just before the accused left the house with the bag. Here again, the existence of the wife and of her living in Kg. Singgahmata and of her packing the bag were not challenged. The prosecution did not offer any evidence as to whether investigation was carried out to determine from where in Kg. Singgahmata the accused had come from before he crossed the bridge to the road side; afterall, it is the prosecution case that the accused came from Kg. Singgahmata. Such evidence could throw light on whether the wife and the house exist as alleged by the accused. The lack of such evidence and the sketchiness of the evidence adduced provided an avenue where the accused simply strolled past with his, not inherently incredible, allegation that his wife packed his bag containing only the items he admitted and not the cannabis and which he carried to the road side to wait for Karim. It is also not in dispute that Pabian exists. It is also not put to the accused that his wife did not exist. The accused testified that on the night in question, Pabian, who also lived in Kg. Singgahmata, and he, after crossing the second bridge, had sat down on the side of the road to wait for Karim to take them to the plantation. It will be recalled that the prosecution evidence was that Pabian was not with the accused when the accused crossed the first bridge but joined the accused after the accused had squatted by the road side. It is unfortunate that Pabian was not called as a witness and this, according to the prosecution, was because

Pabian could not be found. It ought to be pointed out that it was at a very early stage of the prosecution case that it was put to PW2 that the accused was already seated by the road side when PW2 arrived at the place of ambush. It should be apparent, at that stage of the prosecution case when PW2 was being cross-examined, that Pabian would be a vital and important witness and who could give independent evidence to support either the prosecution or the defence evidence, as regards whether he joined the accused before or after the accused had crossed the bridge and whether it was the first or second bridge. Pabian would have provided the best evidence. Pabian's absence, though explained by the prosecution, could not fill this vital part of the evidence, resulting in the accused being able to create a reasonable doubt as to whether Pabian happened to be with the accused in the manner the accused described or in the manner the prosecution described, both versions being at variance. PW6 and PW8, who were members of the ambush party, gave evidence in such manner that I find them to be obviously biased and unreliable. Their evidence cannot be safely relied on as corroborating that of PW2. Take for example, PW6 could remember details about the accused, like his clothing and hair, and the colour of the van which took them to the police station but yet was unable to say what was the colour of the shirt and trousers of Pabian whom he allegedly saw from a distance as Pabian was approaching the accused and whom he was guarding after his arrest and who was only inches away from him. PW8 also cannot remember the same things PW6 cannot remember and which he should be able to since Pabian was under observation by him and was in close proximity to him in the police station. The faulty memories of PW2, PW6 and PW8 make it unsafe for the Court to rely on their evidence solely to convict the accused. Time has taken its toll in this case. They were giving evidence of events that occurred more than 6 $^{1}/_{2}$ years ago; it is no wonder that they cannot recall a lot of things. Pabian was a witness to many of the events of that night and he is therefore a very important and vital witness. Take the conflicting evidence regarding the existence of the person called Pidring. It will be recalled that it is the defence case that Pidring, who has a grudge against the accused, brought PW2 to arrest the accused after the accused was seen by Pidring sitting with Pabian and that Pidring thereafter went away and brought PW2. Pabian could definitely throw light on whether there is any truth in the allegation of the accused in this respect. As stated earlier, Pabian could not be traced to give evidence and the Court is deprived of the best evidence. Pidring could very well have been the person who fed PW2, PW6 and PW8 with the information that the accused would be carrying a bag containing cannabis; otherwise, how else could the person who fed the information have given such detail evidence as the nature and colour of the shirt and pants that the accused would be wearing and the colour of the bag that the accused would be carrying unless that person, not long before he fed the information to the police, had seen the accused. This ties in with the allegation of the accused that Pidring after seeing the accused went away and came back with PW2 to arrest him. The person who fed information to the police and who was not a police informer should have had his name and statement taken by the police so as to assist the police in the investigation of this case. But that was not done and the man who fed the information had vanished. It is very difficult for me to say that the accused was not telling the truth as regards his evidence of Pidring. In any event, the allegation of the existence of Pidring has cast a reasonable doubt as to whether Pidring was with the arresting party of police. If the possibility exists that there was in fact such a person called Pidring, then the possibility exists that it could well be true that Pidring took the bag of the accused when it had no cannabis and later returned it stuffed with cannabis as alleged by the accused. Furthermore, a doubt exists as to the discovery of cannabis in the bag by PW2 not only in the light of what the accused had said but also in the light, as well, of the unsatisfactory evidence of PW2, PW6 and PW8. PW2 had said that he opened the bag in front of the accused, PW6 and Pabian. Five packets were alleged by PW2 to have been removed from two outside pockets of the bag which PW2 allegedly unwrapped revealing dried vegetable matter which were found to be cannabis. PW2 also alleged that he examined another package found inside the bag and while the package was inside the bag and this package also contained dried vegetable matter which was also found to be cannabis. Yet, PW6 testified that he saw only clothing and did not see any of the said packages containing cannabis though he was only inches away from PW2 who allegedly unwrapped the packets.

This evidence of PW6 supports the accused allegation that there was no cannabis in the bag when he was arrested. Though PW6 said that he did not see anything else because he was paying attention to the accused and Pabian, such evidence is inherently incredible; it is not possible for PW6 to have seen clothing in the bag which were not removed from the bag when PW2 examined them and yet did not see the 5 packets being unwrapped by PW2 after they were taken out of the bag. It is possible that PW6 did not see the packets of cannabis because they were not there at all. The failure of PW6 to corroborate PW2 with regards to the discovery of the cannabis in the bag as well as in the outside pockets of the bag cast a doubt on whether the said cannabis were found as alleged by PW2. PW8 was allegedly paying his full attention to what was happening after the accused was arrested also did not say that any packet was recovered from the bag. It ought to be remembered that PW8 testified that he was able to see the accused walking on the bridge and he gave a detail description of not only the type of clothing the accused had on but the colour of the clothing as well. Given his said power of perception from a distance of about 10 to 15 metres away, there is no reason why he could not see PW2 unwrapping the newspaper packets of cannabis from about the same distance if in fact there was such unwrapping of the packets unless there was no such unwrapping which lends credit to the contention of the accused that the bag was not opened in his presence at the place of his arrest and that there was at that time no cannabis in his bag. The uncertainty surrounding the alleged recovery of the cannabis - PW2 being unsupported by PW6 and PW8 as to the discovery of the cannabis when they should be able to and the absence of Pabian who would be the best witness to say whether in fact the cannabis was found in the bag as alleged by PW2 - cast a doubt on whether there was cannabis in the bag when the accused carried the bag on the bridge and when the bag was placed beside him after he had stopped by the side of the road. There is no direct evidence that the accused knew that there was cannabis inside the bag. The presumption that the accused knew that there was cannabis in the bag has been rebutted as a result of the doubt surrounding the alleged recovery of the cannabis. I am aware that it is the prosecution's right not to call a particular witness and that it is through no fault of the prosecution that Pabian cannot be found (see *Muharam bin Anson v. PP* [1981] 1 MLJ 222 FC) but the failure to have Pabian give evidence has resulted in the prosecution failing to discharge its *onus* of proving the case against the accused beyond any reasonable doubt. (See *Abdullah Zawawi v. PP* [1985] 2 MLJ 16, SC.) As to the contention that knowledge of the presence of cannabis can be inferred from the fact that the accused, according to PW2, looked left and right as if the accused wanted to run away, I find it difficult to comprehend how looking left and right can be taken as a sign of running away. PW6 went further than PW2 when PW6 said the accused tried to struggle but when cross-examined he said PW2 applied one of the handcuffs to the right hand of the accused and the other cuff to the hand of Pabian which surely belies his allegation that the accused tried to struggle; if there was such a struggle there was no way PW2 could have single-handedly applied, as was the case, the same pair of cuffs to two persons and there was no allegation from PW2 that he had difficulty applying the cuffs to the accused. Therefore, there is nothing in the behavior of the accused to suggest that he had a guilty mind or that he had knowledge there was cannabis in the bag. In any event, PW2, who effected the arrest of the accused, never said the accused had struggled. The conflict between the evidence of the accused and that of the prosecution continues with regards to the driving of the vehicle to the police station. According to the accused, he, Pabian and Pidring (among others) were in the vehicle and that it was Pidring who drove the vehicle, whereas the prosecution evidence was that there was no such person called Pidring inside the car but that the car, a van, was driven by another person. The said person who drove the van was not called by the prosecution because the police did not take down the details of the said person and do not know who he was. Here again an independent person would have provided the best evidence to resolve the conflicting evidence. That person was not called because the police did not bother to take down the particulars of that person and therefore do not know who he was. Here again, the accused is entitled to the benefit of the doubt. I cannot say that this Pidring was not driving the car since the person who was alleged to be driving the car was not produced by the prosecution. There is no necessity in looking any further into the evidence of the subsequent events. Suffice for

me to say that the accused cannot be believed when he alleged that Pabian had admitted ownership of the cannabis in the police station but that evidence is of no consequence because a case is not decided on whether the Court believes or disbelieves the accused. What evidence I have gone through and for the reasons already given, the accused had cast a reasonable doubt in the case of the prosecution. I therefore discharge and acquit the accused.

The cannabis shall be destroyed by burning in the compound of the Court and the destruction shall be witnessed by the Senior Assistant Registrar of the High Court in Borneo at Tawau but the destruction shall not be carried out until after the disposal of the appeal against the judgment herein or until after the expiry of the time limited for appeal, whichever is later. The cannabis shall in the meantime be kept by the police.

PUNCA KLASIK SDN. BHD.

v.

ABDUL AZIZ BIN ABDUL HAMID & 19 ORS.

HIGH COURT, JOHOR BAHRU
DATO' JAMES FOONG J.
[ORIGINATING MOTION NO. 25-24 OF 1993]
24 OCTOBER 1993

LAND LAW: Entry of caveats on parts of a piece of land - Whether contrary to the National Land Code - Purchaser of the whole piece of land having prior knowledge of the caveators' interests in the land and purchase was subject to the interests in the land - Whether purchaser may be estopped from applying to have the caveats removed - Whether purchaser may be said to be an aggrieved party.

The plaintiff applied by way of motion to remove 20 caveats entered by the 20 defendants abovenamed on a plot of land (Lot 4271) which the plaintiff had purchased from the Trustees of an estate. The defendants had earlier on purchased parts of the plot from the said Trustees and were beneficial owners of their respective portions. The purchase of the whole plot by the plaintiff was subject to all encumbrances in the land, including caveats, interests, occupiers and tenants.

In opposing this application for removal of the caveats, the defendants submitted that:

(i) The plaintiff is not an "aggrieved party" falling within s. 327 of the NLC. The sale of the land to the plaintiff was made with the plaintiff's awareness of the existence of the defendants' interest and their caveats.

(ii) The prior knowledge possessed by the plaintiff of the defendants' interests estops the plaintiff from now seeking to remove the caveats.

(iii) Since the said portions of land had been disposed off earlier by the Trustees to the defendants, the plaintiff had no right to the defendants' interests in the land.

(iv) Section 322(1) NLC should be given a wide interpretation in the interest of justice.

(v) Under s. 327(1) NLC, the Court has the power to order that the caveats remain on grounds it may think just.